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No. 91-550

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE MILLIGAN,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

**BRIEF OF THE RESPONDENT IN OPPOSITION
TO THE PETITION FOR WRIT
OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the Court should decline discretionary review of the ineffective assistance of counsel issue presented in the certiorari petition when petitioner is complaining merely because the Nevada Supreme Court issued an unpublished order, rather than a published opinion, and where Nevada Rule of Appellate Procedure 36 clearly contemplates the issuance of orders without opinions in cases decided by the Nevada Supreme Court.

2.

Whether the Court should decline discretionary review of the ineffective assistance of counsel issue presented in the certiorari petition where the evidence clearly indicated, and all Nevada courts found, that the so-called "accomplice" was not an accomplice, and where sufficient corroborative evidence independent of this testimony existed.

3.

Whether the Court should decline discretionary review of the evidence sufficiency issue presented by the certiorari petition where (1) petitioner failed to raise this issue in the state appeal of which he is seeking review, (2) where any rational trier of fact could find sufficient evidence and (3) where petitioner is merely seeking to substitute the judgment of a court for that of the jury.

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OPINIONS AND JUDGMENTS DELIVERED BELOW

The petitioner, RONNIE MILLIGAN (hereinafter MILLIGAN) purports to present three issues to this Court for certiorari review. See Milligan v. State of Nevada, Case No. 91-530, Petition for Writ of Certiorari. Review is sought of the unpublished Order Dismissing Appeal by the Nevada Supreme Court filed June 17, 1991 (Petitioner's Appendix, 2a). A petition for rehearing was denied by an Order Denying Rehearing, filed August 28, 1991 (Petitioner's Appendix, 1a).

That appeal was taken from an unpublished opinion of the district court of the Sixth Judicial District Court of the State of Nevada, Humboldt County, filed September 14, 1990, denying post-conviction relief (Petitioner's Appendix, 5a - 44a).

MILLIGAN's murder conviction was affirmed by the Nevada Supreme Court on direct appeal in Milligan v. State of Nevada, 101 Nev. 627, 708 P.2d 289 (1985).

A petition to review that decision on certiorari was denied by this Court in Milligan v. State of Nevada, 479 U.S. 870, 107 S.Ct. 238, 93 L.Ed.2d 163 (1986).

An order of the Nevada Supreme Court has stayed the issuance of remittitur in the case and execution of the death sentence until October 5, 1991, and thereafter, during the pendency of this petition, if the petition is filed within the original stay period.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked by the subject certiorari petition pursuant to § 1257(3) of Title 28 to the United States Code. 28 U.S.C. 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 17 of the United States Supreme Court Rules:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and

will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.

STATEMENT OF THE CASE

MILLIGAN was sentenced to death for the robbery and murder of Zolihan Voinski on January 27, 1981. Thereafter, he appealed directly to the Nevada Supreme Court which affirmed the conviction and sentence on October 28, 1985. See Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985). Certiorari was denied by this Court on October 6, 1986. Milligan v. State of Nevada, 479 U.S. 870, 107 S.Ct. 238 (1986).

On July 4, 1980, MILLIGAN was detained and subsequently arrested in Humboldt County, Nevada, along with two other men, a woman and a young girl. He was subsequently charged with murder and robbery with a deadly weapon of the victim, Zolihan Voinski. A pretrial hearing on motions was held on January 6, 1981. Counsel for MILLIGAN had filed nineteen motions. Jury selection began on January 7th and the individual voir dire consumed three and one-

half days through January 13th. The trial was held during a seven-day period from January 13 to January 22, 1981. After MILLIGAN was found guilty of first degree murder and robbery with a deadly weapon on January 22, the penalty hearing was conducted on January 27th. The jury set the penalty at death.

The original trial counsel for MILLIGAN withdrew and were replaced by new counsel on July 20, 1981. On that day, the new counsel filed a motion for new trial and the motion to strike the death penalty. The motions were heard on July 20th. Counsel for MILLIGAN argued that the underlying felony could not be used as an aggravating circumstance in the penalty hearing because MILLIGAN was guilty only of felony murder. Counsel also contended that the voir dire was deficient, the scope of the voir dire was restricted, exhibits and testimony were prejudicial, instructions were improper,

there was prosecutorial misconduct, evidence was destroyed, and the penalty instructions, procedure and argument were improper. The motions were denied.

MILLIGAN was formally sentenced on August 3, 1981, and the judgment of conviction was filed on August 17th. The court imposed the sentence of death and two consecutive 15-year sentences for the crime of robbery with a deadly weapon. The first of the prison sentences was to run concurrent to the death sentence. The court denied the motion by the state to enhance the sentence because the victim was over 65 years of age. An order for stay of execution was filed on August 17th.

The evidence at trial revealed that MILLIGAN and his four companions left on a trip to California from Louisiana in late June of 1980. Somewhere in Nebraska, they picked up Ramon Houston, who was hitchhiking and who would later be the key witness in

this case. At trial, MILLIGAN was able to recall many of the facts of the trip up until the murder. Coincidentally, he was unable to remember anything about the arrival of the elderly female decedent, Zolihan Voinski, at the rest stop where MILLIGAN and his companions were. Nor was MILLIGAN able to recall anything about the victim or the murder itself. The next instances MILLIGAN claimed to remember were some occurrences when he was booked.

The evidence presented at trial established that, although MILLIGAN had been drinking during the trip, the effects of the alcohol on MILLIGAN were not extreme. On the day of the murder, MILLIGAN had his picture taken with others while they were at the rest stop. MILLIGAN did not appear to be off balance. At the rest stop MILLIGAN also played with a stick as if he were searching for water, helped some children get a drink and pulled the car

closer to the group. MILLIGAN, for the most part, had no difficulty walking and talking. At the time of the murder, MILLIGAN grabbed the victim by the shoulders. MILLIGAN then retrieved a twelve pound sledge hammer from the car, struck the victim in the head at least twice and returned the hammer to the car. After the group returned to the rest area and MILLIGAN got to the victim's vehicle, a "thumbs up" sign was given by MILLIGAN.

When MILLIGAN was detained later by officers, he had enough sense to put on a shirt in the hot sun. Circumstantial evidence also indicated that MILLIGAN had attempted to dispose of the victim's purse by placing it under the car. When asked for his identification, MILLIGAN had no difficulty producing it and was aware he was being detained by police officers. MILLIGAN later provided personal information to the jailer and signed booking sheets.

The next area of facts discussed here relates to the testimony of Ramon Houston. The evidence was uncontroverted that Houston knew very little English. Houston was truthful with the jury in describing his criminal record. He described the events in great detail. Separate evidence connecting MILLIGAN to the murder came from the testimony of persons other than Ramon Houston. The facts showed that MILLIGAN was seen at the time of his arrest near the location where the victim's discarded purse was found. The victim's stolen Volkswagen bus was parked near the same place and had been rummaged through. Photographs connected MILLIGAN with his accomplices and with Ramon Houston, at a rest stop. Photos also showed that a purse normally worn by the victim around her waist was missing when she was found. A presumptive test for blood on MILLIGAN's shoes and pants was positive. There was also human blood found on the

clothing of MILLIGAN's companions. A hair found on MILLIGAN's shoe was similar and almost identical to the hair of the victim. There was hair and blood on the sledge hammer located near the highway along with the victim's purse. A power plant guard had seen the car in which MILLIGAN and his companions were riding near the scene of the murder and close to the time of its occurrence.

A final area of facts to be discussed concerns the quality of assistance provided to MILLIGAN. During the guilt phase of the trial, MILLIGAN had the benefit of three attorneys. These attorneys included the new deputy public defender in Winnemucca, a private attorney who had been the resident public defender in Winnemucca, and a private attorney from Atlanta, Georgia. The Georgia Attorney, Anthony (Tony) Axam, had experience in 50 homicide cases. Tom Perkins, the Winnemucca counsel and lead counsel in the

case, was a former deputy public defender and had defended a few homicide cases. During the jury selection phase, the defense employed a psychologist as an expert who specialized in jury selection and voir dire in capital cases.

After the Nevada Supreme Court affirmed his conviction, MILLIGAN commenced his state post-conviction process pursuant to NRS 177.315 on May 13, 1987, and filed his first amended petition for post-conviction relief on October 13, 1987. Respondent's answer was filed on July 22, 1987. Thereafter, a hearing on the petition was held on September 19 through September 21, 1988, followed by briefs from the parties. The trial court issued its lengthy written decision on September 14, 1990. From that decision, MILLIGAN appealed to the Nevada Supreme Court. The Nevada Supreme Court entered its order dismissing appeal on June 17, 1991. Thereafter, MILLIGAN filed a petition for

rehearing on July 1, 1991. That petition for rehearing was denied on August 28, 1991. MILLIGAN now brings this petition for certiorari.

SUMMARY OF THE ARGUMENT

There are several reasons why this court should decline to review the decision of the Supreme Court of the State of Nevada. First, these are not the types of issues that this Court should be reviewing. MILLIGAN is first complaining of the "summary state disposition" of the case. This Court should not be reviewing the manner and procedure in which a state's highest court issues its orders or opinions, sets its time for argument, and the length of its orders. For instance, counsel in oral argument in the Nevada Supreme Court did not request additional time to argue in any motion. Unpublished orders from the Nevada Supreme Court are both allowed by Nevada Supreme Court rules and not pro-

hibited by any federal constitutional law. MILLIGAN incorrectly states that the state district court rendered its decision without making any findings of fact. Even though the lower court order did not have a separate category entitled "findings of fact," it issued a lengthy opinion with findings of fact throughout the opinion as well as conclusions of law. See Petitioner's Appendix 5a.

This Court should not review this matter because MILLIGAN's second issue is not one worthy of review either. The evidence was clear, and both the lower court and the Nevada Supreme Court so concluded, that Ramon Houston was not an accomplice. Therefore, all of MILLIGAN's arguments regarding the accomplice issue are without merit. In any event, there was substantial corroborative evidence in addition to the testimony of Ramon Houston.

Finally, MILLIGAN claims the evidence does not support the conviction. This issue was not raised in the appeal below. It was previously raised on direct appeal. Once again, as he did before the jury, before the state district court, and before the Nevada Supreme Court, he asks a court to substitute its opinion for that of the jury. It is clear that any rational trier of fact could have found evidence beyond a reasonable doubt to support this conviction.

ARGUMENT

- A. THE NEVADA SUPREME COURT'S DISPOSITION OF THE APPEAL BY WAY OF AN UNPUBLISHED OPINION, ITS CONTROL OVER ORAL ARGUMENT BY ALLOWING EACH COUNSEL FIFTEEN MINUTES, AS WELL AS ITS CONTROL OVER THE LENGTH OF ITS ORDERS OR OPINIONS, ARE NOT MATTERS WITHIN THE SCOPE OF CERTIORARI IN THIS COURT SINCE THIS COURT IS NOT A COURT OF ERRORS NOR IS THIS COURT A SUPERVISORY COURT OVER THE STATE SUPREME COURTS.

MILLIGAN first complains that the state district court, after a three-day evidentiary hearing, issued a decision without

making any findings of fact. Petitioner has attached this opinion as an appendix to his petition for certiorari. (Petitioner's Appendix at 5a). A review of the state district court decision refutes MILLIGAN's assertion. This lengthy order contains findings of fact throughout the decision, although the lower court did not specifically add a separate section entitled "Findings of Fact." Furthermore, any requirement under Nevada statutes relating to findings of facts is a question of state procedure and should not be reviewed on certiorari before this Court.

MILLIGAN next complains that during appellate oral arguments, counsel was only allowed to argue fifteen minutes plus another two or three minutes. Even this Court usually only allows one-half hour for each party for oral argument. In any event, MILLIGAN's counsel never requested prior to his argument any additional time to argue

the case nor has he identified what he would have said dispositively if additional time had been allotted.

MILLIGAN next complains that the Nevada Supreme Court should not have issued an unpublished order, but should have issued a published opinion. He also complains of the fact that the Order Dismissing Appeal consisted only of three paragraphs. MILLIGAN cites Nevada Revised Statutes 177.385 as authority for this proposition. The statute does not specify the manner in which the Nevada Supreme Court has to dispose of appeals of post-conviction petitions, either in capital or non-capital cases. All the statute provides for is that a petitioner or the state may seek review of the case if proper jurisdictional prerequisites are met. In fact, NRAP 36 clearly contemplates the issuance of orders, without opinions in cases decided by the

Nevada Supreme Court. The relevant rule states in pertinent part that:

The filing of the court's decision or order constitutes entry of the judgment . . . if a judgment is rendered without an opinion, the clerk shall enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the order entering judgment, if no opinion was written.

The mere establishment of a statutory right to appeal by the legislature does not require that a published opinion be rendered. Indeed, it would appear that any number of states, including Virginia and California, provide for either discretionary review or summary disposition by their high courts upon the denial of post conviction applications rendered by the lower courts of the State of California. In a case recently decided by this Court, the Supreme Court of Virginia disposed of a petitioner's appeal in summary fashion. That order was affirmed by this Court in Coleman v.

Thompson, _____ U.S. _____, 111 S.Ct. 2546 (1991). On the same day, this Court also decided a case involving an appeal by the State of California from a decision of the United States Court of Appeals for the Ninth Circuit. The federal appellate court had ruled that the summary orders issued by the California Supreme Court denying certiorari constituted adjudications on the merits. The Ninth Circuit's opinion was overturned. Nothing in the decision by this Court could even arguably lead one to conclude that summary denial of a post-conviction appeal, in either a non-capital or capital case, would constitute a denial of due process. Ylst v. Nunnemaker, _____ U.S. _____, 111 S.Ct. 2590 (1991).

Secondly, in its Order Dismissing Appeal, the Nevada Supreme Court concisely and without elaboration, merely held that its decision in Orfield v. State, 105 Nev. 107, 771 P.2d 148 (1985), applied and was

controlling in this case, thus rejecting MILLIGAN's contentions to the contrary. Those contentions were the same prior to the rendition of the Nevada Supreme Court's ruling as they were in the petition for rehearing.

In the last paragraph of the Order Dismissing Appeal, the Nevada Supreme Court clearly and concisely rejected MILLIGAN's claim of disproportionality of sentence, noting that it had disposed of the issue in the direct appeal, although in a way unfavorable to MILLIGAN.

All of these claims are simply complaints about the manner in which Nevada procedurally adjudicates appeals of petitions for post-conviction relief. This Court is not a court of errors, nor is this Court a supervisory court over the Nevada Supreme Court. Therefore, these matters are not a proper subject for review in this petition for certiorari.

B. THE TESTIMONY OF RAMON HOUSTON WAS NOT ACCOMPLICE TESTIMONY, AND IN ANY EVENT, THERE WAS SUFFICIENT CORROBORATIVE EVIDENCE INDEPENDENT OF HOUSTON'S TESTIMONY.

MILLIGAN contends, as he did in the state district court and the Nevada Supreme Court, that he was improperly convicted based on the uncorroborated testimony of an accomplice. Both the state district court and the Nevada Supreme Court held that Ramon Houston was not an accomplice. MILLIGAN is not only seeking to substitute this Court's finding as to whether Houston was an accomplice, but is seeking to argue Nevada law relating to accomplice testimony as a constitutional issue before this Court. See Orfield v. State, 105 Nev. 107, 771 P.2d 148 (1989). Finally, it should be noted that the record is replete with corroborative evidence independent of Ramon Houston's testimony.

Houston simply was not an accomplice. A person is not an accomplice merely because he happens to be present while the crime was committed. Houston left the group and notified police so the victim could receive aid. He implicated the others by word and deed prior to arrest. All of this factually negated Houston having the requisite criminal intent to be an accomplice.

Even if Houston were an accomplice, there is ample evidence to corroborate Houston's testimony under Nevada law. The evidence at trial of photographs of all of the occupants in co-defendant Bonnette's vehicle infer that all were travelling together. The location of the victim's Volkswagon bus led to the inference that it had to have been taken and driven by someone from at least Valmy to Golconda. The observation by the security guard leads to the inference that the Volkswagon was not present at the scene of the murder, thus

inferring it was at the rest stop. The discarded purse in close proximity to MILLIGAN led to the inference that the purse was taken from the murder scene and driven to Golconda where the victim's vehicle was also located. All of these facts, circumstances, and inferences tend to connect MILLIGAN to the crime.

It is important to note that corroboration under Nevada law is only required if Houston were an accomplice. Nev.Rev.Stat. 175.291. Nevada's requirement does not create an issue that is proper for review by this Court.

C. **ANY RATIONAL TRIER OF FACT COULD HAVE FOUND EVIDENCE OF EACH ELEMENT BEYOND A REASONABLE DOUBT.**

MILLIGAN next seeks review by this Court, claiming that the evidence does not support the conviction. First, he is seeking once again to substitute the judgment of a court for that of the jury. Second, this issue was not raised in the

petition for post-conviction relief and the subsequent appeal from the denial of that conviction. MILLIGAN did raise this issue in his direct appeal and this Court denied his petition for certiorari from that direct appeal. However, this is a petition for certiorari from the Order Dismissing Appeal by the Nevada Supreme Court, not from the direct appeal. Therefore, this issue should not be reviewed belatedly by this Court.

This Court has stated that the standard for review for sufficiency of evidence to support a criminal conviction is whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Applying this standard to this case, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

CONCLUSION

Respondent respectfully requests that this Honorable Court deny the certiorari petition of RONNIE MILLIGAN.

Respectfully Submitted.

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